Supreme Court, U.S.
FILED

94 599 SEP 30 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

KEITH MILTON RHINEHART,
a single person;
AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation,

Petitioners,

vs.

THE SEATTLE TIMES,
a Delaware corporation,
d/b/a THE SEATTLE TIMES,
ERIK LACTITIS and JANE DOE LACITIS,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeals, Division I,
Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

JEAN SCHIEDLER-BROWN
Attorney of Record for Petitioners
LAW OFFICES OF JEAN SCHIEDLER-BROWN AND ASSOC., P.S.
606 Post Avenue, Suite 101
Seattle, WA 98104
(206) 223-1888
FAX: (206) 622-4911

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED FOR REVIEW

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES.*

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to action dismissed for lack of merit? *YES.*

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES.*

PARTIES TO THE PROCEEDING

All parties for the captioned case on the cover are fully set forth. This case is consolidated with:

AQUARIAN FOUNDATION,
a not-for-profit corporation;
REVEREND KEITH MILTON RHINEHART,
a single person;
LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC.
a Delaware corporation;
ROSS ANDERSON, JANE DOE ANDERSON,
and his marital community,

Respondents.

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REPORTS OF OPINIONS IN THE CASE..... 1

GROUNDS UPON WHICH U.S. SUPREME COURT JURISDICTION INVOKED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE 3

FEDERAL QUESTIONS TIMELY RAISED 8

ARGUMENT..... 9

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES* 11

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to action dismissed for lack of merit? *YES*..... 19

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES*..... 22

TABLE OF CONTENTS – Continued

Page

CONCLUSION..... 25

APPENDICES ..... App. 1

A. OPINION SOUGHT TO BE REVIEWED AND SUBSEQUENT ORDERS..... App. 1

1. *OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION I, Rhinehart v. the Seattle Times* 59 Wash. App. 332, 798 P.2d 1155 (1990).....App. 1

2. Order affirming decision after remand, May 3, 1993.....App. 15

3. Order denying Appellants' Motion for Reconsideration, December 6, 1993...App. 17

4. Order denying Petition for Review to Washington State Supreme Court, July 6, 1994..... App. 19

B. CONSTITUTIONAL AND STATUTORY PROVISIONS CITED..... App. 21

1. *U.S. CONSTITUTION, AMENDMENT I*..... App. 21

2. *U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1*....App. 22

3. *RCW 4.84.185*.....App. 23

TABLE OF AUTHORITIES

Page

CASES:

Black Panther Party v. Smith, 661 F.2d 1243 (C.A D.C. 1981) 17

Britt v. Superior Court, 20 Cal. 3d. 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978) 15, 17

Britton v. Rogers, 631 F.2d 572 (C.A. Ark, 1980), *cert. den.* 101 S.Ct. 2021, 451 U.S. 939, 68 L.Ed.2d 327 21

Brown v. Socialist Workers, 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982)..... 15, 17

Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972)..... 17

Caldwell v. State of Texas, 11 S.Ct. 224, 137 U.S. 692, 34 L.Ed. 816 (1891) 21

Church of Hakeem, Inc. v. Supreme Court, 110 Cal. App. 3d. 384, 168 Cal. Rptr. 13 (1980) 17

Ciechon v. City of Chicago, 686 F.2d 511 (C.A. Ill. 1982) 21

Ealy v. Little John, 569 F.2d 219 (5th Cir. 1978) 17

Eilers v. Palmer, 575 F. Supp. 1259 (Mn. 1984) ..16, 18

Families Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976) 17, 18

Gaglidari v. Denny's Restaurants, 117 Wash.2d 426, 815 P.2d 1362 (1991) 20

Hanbron v. Epstein, 412 F. Supp. 256 (D.C. Md 1976) *aff'd* 97 S.Ct. 41, 429 U.S. 802, 50 L.Ed.2d 67 22

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Chicago, 36 S.Ct 715, 241 U.S. 533, 60 L.Ed. 1148 (1916) 23

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 1171 L.Ed.2d 1483 (1958) 17

Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (Wash. 1987) 20

Pearson v. Northeast Airlines, 309 F.2d 553 (C.A.N.Y 1962) *cert. den.*, 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720 21

Rhinehart v. KIRO, 44 Wash. App. 707, 723 P.2d 22 (1986) 14

Rhinehart v. Seattle Times, 98 Wash.2d 226, 654 P.2d 673 (1982) 13, 14

Rhinehart v. Seattle Times, 59 Wash. App. 332, 798 P.2d 1155 (1990) 1, 13

Seattle Times v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) 3

Shock v. Tester 405 F.2d 852 (C.A. Ark 1969), *cert. den.* 89 S.Ct. 1641, 394 U.S. 1020, 28 L.Ed.2d 45; *reh. den.* 89 S.Ct. 2004, 395 U.S. 941, 23 L.Ed.2d 460 22

Snedigar v. Hodderson, 114 Wash. 2d 153, 786 P.2d 781 (1990) 11, 12, 13, 14, 16

Stone v. Chelan County Sheriff's Dept., 756 P.2d 736, 110 Wash.2d 806 (1986) 24

Streater v. White, 26 Wash. App. 430, 613 P.2d 187 (1980) 25

Surinach v. Presquera de Busquets, 604 F.2d 73 (1st Cir. 1979) 17

TABLE OF AUTHORITIES – Continued

Page

Travis v. Washington Horse Breeders, 111 Wash. 2d 396, 759 P.2d 418 (Wash. 1988) 20

Zannino v. Arnold, 531 F.2d 687 (C.A. Pa. 1976) 24

OTHER AUTHORITIES:

United States Constitution, Amendment I ..... *passim*

United States Constitution, Amendment XIV, Section 1 2

Revised Code of Washington, 4.84.185 ..... 2, 9, 19, 20

No. _____

In The

Supreme Court of the United States

October Term, 1994

KEITH MILTON RHINEHART,
a single person;
AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation,

Petitioners,

vs.

THE SEATTLE TIMES,
a Delaware corporation,
d/b/a/ THE SEATTLE TIMES,
ERIK LACTITIS and JANE DOE LACITIS,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeals, Division I,
Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

THESE ARE FULLY SET FORTH IN APPENDIX A, AND INCLUDE:

***OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION I, Rhinehart v. the Seattle Times,* 59 Wash. App. 332, 798 P.2d 1155 (1990); Order affirming decision after remand, May**

3, 1993; Order denying Appellants' Motion for Reconsideration, December 6, 1993; Order denying Petition for Review to Washington State Supreme Court, July 6, 1994.

GROUNDS UPON WHICH JURISDICTION OF U.S. SUPREME COURT INVOKED

This case seeks review of two consolidated King County Superior Court cases, # 82-2-17487-4 and #86-2-09172-6. The cases were dismissed and costs and attorneys fees in 86-2-09172-6 were awarded on April 22, 1988; an order setting the amount of fees awarded was entered May 11, 1988. This matter was timely appealed to the State of Washington Court of Appeals, division I, found partly meritorious in a published opinion, and affirmed after remand. Petition for review was timely made and was denied July 6, 1994. (See App. 1 *et seq.*)

Jurisdiction is conferred upon this court by 28 USC 2101 (c) and 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendments I and XIV. (at App. 21 and App. 22 herein)

Revised Code of Washington 4.84.185 (At App. 23 herein)

STATEMENT OF THE CASE

This Petition for Certiorari arises from the dismissal of two separate defamation suits, consolidated at the trial court level, filed against the Seattle Times by Aquarian Foundation and its Spiritual Leader, Reverend Keith Milton Rhinehart.

The first, **AQUARIAN FOUNDATION v. SEATTLE TIMES**, 1982, concerned a defamatory article written by Erik Lacitis, a Seattle Times Staff Columnist. (CP 17.) This article was engineered by The Seattle Times' attorneys, who solicited and provided an attorney for the filing of a lawsuit against Aquarian Foundation, a Spiritualist religion. The case was never prosecuted, but pleadings were extensively published in the newspaper, in order to circumvent a court protective order regarding prior litigation between the parties. (The protective order was upheld by This Court in ***Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).** The trial judge declined to dismiss the case on the merits pursuant to a summary judgment motion, but dismissed it after Aquarian Foundation failed to comply with the order of discovery of AQUARIAN FOUNDATION'S membership list. The second case, ***AQUARIAN FOUNDATION v. SEATTLE TIMES,*** 1986, concerned articles (CP 5043) written by Ross Anderson, a writer for the Times Washington Bureau (CP 5084.) On May 11, 1988 the trial court entered an order finding the claim a frivolous one. On post trial motion the trial court

awarded $40,000 in attorneys fees and $1,983.21 in expenses, although counsel never segregated the time entries as to those that were necessary because of the dominant case. Appellants filed a timely consolidated appeal on May 20, 1990.

In a published opinion on August 13, 1990, the appeal was partly affirmed and partly remanded because the Trial Court had abused it's discretion in faili g to create a sufficient record as to the amount of fees awarded. After remand, the trial court findings were affirmed. (THE FULL TEXT OF THE PUBLISHED DECISION APPEARS AT APP. 1 HEREIN.)

(2) FACTS RELEVANT TO THE RELIEF SOUGHT

1982 CASE: ENGINEERED DEFAMATION

This defamation case concerns an article, "Lawsuits, Controversy Still Surround Aquarian Leader", by Erik Lacitis, and published in the Seattle Times Newspaper on January 3, 1981. (CP 25.) Plaintiffs alleged an extensive list of false, defamatory statements in this article, (CP 1492.) The Seattle Times has a history of publishing defamatory articles concerning AQUARIAN FOUNDATION, a Spiritualist religion. (CP 1497.)

The Lacitis article quoted from a lawsuit filed (in name) by former Church members. (CP 25.) Remarkably, the lawsuit was inspired and engineered by the Seattle Times' own attorneys to create a public record so that the Newspaper could publish quotations without being subject to a defamation

lawsuit, or a prior court order barring them from naming Religion members. Direct payments by Seattle Times attorneys to bring the former church member to Seattle from Hawaii (CP 2063), and to pay her for lost time from her job, (CP 2063) and to convince her to file the lawsuit, (CP 2064) and to locate an attorney for her without charge (CP 2062), created an ugly pattern of persecution of this minoritarian religion.[1]

The lawsuit was drafted to self-serve the Seattle Times, including allegations (irrelevant to the purported plaintiff/former Church members) that the Church used lawsuits to harass the media. (CP 1840.)

The trial court declined to grant summary judgment to defendants, but instead dismissed the lawsuit for failure to produce membership lists and a videotaped presentation of the church to the Walla Walla prison. (CP 4628.)[2]

Plaintiffs had supplied massive discovery materials, thousands of pages, including, among other documents, 9 depositions, and had offered

---

[1] The law suit, widely quoted in the newspaper, was never prosecuted. (King County Case no. 80-2-16434-1.) The former Church member, Denise Herr, was adjudged to have taken several thousands of dollars of Aquarian Foundation property in a separate action. When she tried to discharge the debt in Bankruptcy court in Hawaii, She was adjudged a "defalcator" and discharge was denied.

[2] The Petitioners agreed to produce the video presentation if certain portions were edited or altered to protect the identity of individuals, but the trial court declined to fashion these protections.

boxes of church records regarding donations and receipts to be examined. The Seattle Times never attempted to contact any of the persons identified in the depositions, nor did it request an appointment to view any records that were offered to it. There was no attempt at any alternative ways to discover information relative to the defense, although Plaintiffs filed a memorandum suggesting several alternative methods to obtain or seek the same data. (CP 1223.) The Seattle Times never offered any evidence that the membership lists and/or the videotape was critical to its defense that the articles it published were not defamatory.

1986 CASE CONSOLIDATED WITH 1982 CASE, DISMISSED AS FRIVOLOUS.

The 1986 lawsuit was based upon a series of articles referring to Aquarian Foundation as a "cult." (CP 5040) and referring to Reverend Keith Milton Rhinehart as a "Cult Leader." (CP 5040.) This article was a contemporary of the media blitz of such murderous cults as that of Jim Jones.[3] The term "bizarre" was used to describe plaintiffs, (CP 5086) and the paper reported that Reverend Rhinehart was wealthy from funds "accumulated to the expense of the Foundation, its members, and its donors." (CP 5085.)

---

[3] Major media had directly tried to incite a "Jim Jones" image for Petitioners; KIRO TV panned rows of dead bodies in Guyana, followed by a shot of Petitioner's Church and church name. King County Docket No. 86-2-03775-6.

The 1986 lawsuit was filed separately by prior counsel, and was consolidated with the 1982 case by motion of Aquarian Foundation to conserve judicial resources. The trial court granted a summary judgment and found the 1986 lawsuit to be frivolous.

COURT ORDERS $40,000 IN FEES FOR 1986 LAWSUIT

The order regarding attorneys fees for the 1986 case was entered pursuant to an affidavit of P. Cameron DeVore, (CP 4485.) The affidavit did not segregate the fees for the predominant 1982 action from the fees for the 1986 action. Instead, it includes work conducted on the 1982 case, and work regarding thousands of pages of discovery that relate solely to that case.

Except for approximately $6000.00 in entries, all of Mr. DeVore's affidavit demonstrates that the time spent was necessary for furthering the work on the **1982** case, the case that was not found frivolous, and in which the court declined to grant summary judgment on the merits. Nevertheless, Mr. DeVore's affidavit arbitrarily claimed 50% of his firm's work to be allocated to the **1986** case.

Specifically, entries for 8/8/86, 8/11/86, and 8/12/86 relate to reviewing the brief for a motion to dismiss/summary judgment, revising the brief, and editing the brief for the 1986 case, which was dismissed pursuant to that summary judgment motion. The total fees claimed at the end of page 6 (CP 4491) is $5669.00.

Fees claimed from page 7 through 28 of the DeVore affidavit are, except for a few limited entries, tasks clearly necessary for defending the 1982 case.

The fee award troubled the state court, and the case was remanded for further findings of fact. App. 12. However, the court did not require that the fee request be segregated between actual work that was required by the case deemed by the court to be frivolous, and the dominant, 1982 case.

APPEALS COURT USES SUBJECTIVE CRITERIA

In upholding the finding of frivolity of the 1986 case, the State court used two criteria: one, applied to Petitioners, was whether there is a reasonable possibility of success. (App. 11.) The other, more commonly applied to other litigants, was whether there is a basis for the action in fact or in law.

FEDERAL QUESTIONS TIMELY RAISED

All of the issues herein were considered in the court's published opinion, set forth in full in beginning at App. 1. The issues were preserved by petitioners in their Petition for review with the State Supreme Court, through numbers 1,2,3, and 5 listed on page 2.

ARGUMENT

THE ISSUES SET FORTH IN THIS PETITION ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN BUT SHOULD BE, SETTLED BY THIS COURT.

Summary of Arguments

In this case, a Spiritualist religion sought to prevent a predatory press from defaming it, and then was forced to choose between its First Amendment Rights to keep secret its membership lists, and its need to vindicate its reputation. Further, the religion was punished by the courts, and forced to pay more than $40,000 in terms, although only a minor portion of the cases before the courts were found frivolous.

By ordering membership lists, without conducting a balancing test as to the need for the data and the availability of alternative sources of discovery, the state court invaded the First Amendment rights of Aquarian Foundation and its members. Imposing a protective order was only a band-aid, when First Amendment Rights of innocent Church members were ordered to be invaded without a finding that the defendant's need for the data outweighed the rights to privacy and association of the members.

As if rubbing acid into a wound, the court then imposed more than $40,000.00 in fees against the petitioners, although it dismissed a very simple portion of the case. The fee award was purportedly authorized by a State law, RCW 4.84.185, allowing "reasonable fees" for portions of cases found frivolous. The court improperly allowed Seattle Times

counsel to arbitrarily allocate 50% of fees to that minor part of the action.

This award is phenomenal. For example, in the Ninth Circuit large monetary sanctions (greater than $25,000.00) are granted in less than 4% of cases. See, *Otorowski* at 24. Terms of this magnitude are excessive and shocking, and could literally bankrupt a minority association. The state court exacted this property from petitioners by exceeding its constitutional authority under the statute; the statute authorizing fees allowed an award for only the "action, counterclaim, cross claim, third party claim or defense" deemed frivolous. App. 23.

In further rulings showing an attitude towards this Spiritualist religion as a second class litigant, the state court applied a subjective criterion, "possibility of success," in upholding a finding of frivolity. This criterion is fashioned to defeat and jeopardize the minoritarian litigant, who, when championing an extension or modification of the laws, will always have a lesser "possibility of success." Therefore, the state court rulings establish a precedent to punish, and chill, the ability of minoritarian groups to seek justice in the Washington state courts.

ARGUMENT

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES.*

A. *ALTHOUGH IN 1990, THE WASHINGTON SUPREME COURT ENDORSED THE BALANCING TEST CONSISTENTLY WITH FEDERAL LAW, THE CASE AT BAR REPRESENTS A RETREAT FROM THOSE CRITERIA.*

***Snedigar v. Hodderson,* 114 Wash. 2d 153, 786 P.2d 781 (1990)** reversed a default judgment against a political party, when the trial court had ordered membership lists and minutes of meetings. The case was remanded to require the trial court to engage in a balancing test between the First Amendment Constitutional right to privacy of the political party members, and the extent to which the discovery sought was relevant, essential to the opposing party's case, and not reasonably available through other means.

Thus, the Washington courts adopted the prevailing analysis required to protect the First Amendment rights to freedom of Religion and Freedom of Association, agreeing with other federal and state courts that disclosure of membership lists will chill the First Amendment rights of an association. **114 Wash. 2d. at 162.** In the ***Snedigar*** case, the court opined:

> **Given the great importance of these rights, it is preferable to weigh whatever claims of chilling effect are made against the need for disclosure.** ***Id. at 163.***

The court then described the rest of the balancing test involved in assessing a discovery request for associational information.

> **[O]nce a threshold showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevancy and materiality of the information sought, and to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful.** ***Id.*** **at 164 . . .**
>
> **With regard to relevancy, the interest will be regarded as relatively weak unless the information goes to the "heart of the matter" . . . Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity . . .**
>
> **The litigant seeking disclosure must also show that efforts have been made to obtain the information by other means . . . [S]hould be compelled only after the litigant has shown that he has exhausted every reasonable alternative source of information.** ***Id. at 165.***

The ***Snedigar*** court remanded the case to the trial court to require the requesting party to show the need for the information and to demonstrate how it had attempted to obtain the information in other ways.

In the instant case, the state court of appeals ignored the clear criteria of the ***Snedigar*** court. The August, 1990 opinion states:

> **Indeed, under *Snedigar*, the second and third steps of relevancy evaluation and balancing would not be reached here because the findings and conclusions of the prior cases have already determined that Rhinehart has not shown some probability that the requested disclosure would impinge on the Foundation's constitutional rights, especially in light of the protective orders. *Rhinehart v. Seattle Times*, 59 Wash. App. at 338. (at App.7 herein)**

In fact, prior ***Rhinehart*** cases found just the opposite. The first case, ***Rhinehart v. Seattle Times Co.*, 98 Wash. 2d. 226, 654 P.2d 673 (1982)**, includes a specific record of media harrassment and reprisals, and in it the trial judge in that case specifically found:

> **[I]f protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." . . . If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as**

> **can result from an impingement upon First Amendment Rights.** ***654 P.2d at 675.***

This language confirms that the trial court found a probable invasion of First Amendment rights, and thus the Appeals court's reading of these prior cases in the instant case is completely erroneous.[4]

Additionally, in the 1982 case before This Court, the allegations are part and parcel that of direct harrassment by the media, to the extent of soliciting former members of Petitioner to file litigation against Aquarian Foundation.

THE BALANCING TEST IS REQUIRED BECAUSE OF IMPINGEMENT ON FIRST AMENDMENT RIGHTS, AND BECAUSE OF THE CHILLING EFFECT UPON THE FREEDOM OF ASSOCIATION AMONG INNOCENT THIRD PARTIES.

> **. . . [F]or more than two decades decisions of both the United States Supreme Court and this court, recognizing that compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional right of association, have established that such intrusion into associational privacy may be sanctioned only**

---

[4] Later ***Rhinehart*** cases have similarly not addressed the specific balancing criteria required by ***Snedigar,*** which was decided later than these cases, i.e., ***Rhinehart v. KIRO,*** **44 Wash. App. 707, 723 P.2d 22 (1986).**

> **upon the demonstration of a very important, indeed "compelling", . . . interest which necessitates the disclosure.**

***Britt v. Superior Court,* 143 Cal. Rptr. at 697.**

This Court has repeatedly defined a test that requires a very low threshold of scrutiny in order to require a balancing test to exempt minor parties from compelled disclosures:

> **. . . need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from . . . private parties.**

***Brown v. Socialist Workers,* 459 U.S. 87, 74 L.Ed.2d 250, 103 S.Ct. 416 (1982).**

This threshold was met by Aquarian Foundation both through the affidavits of actual harrassment submitted throughout the various actions against the defaming media, and through the very nature of the facts in this action, where the media's own attorneys actively cajoled and paid former members to defame the organization. The media exhibited a pattern of hostility towards this minoritarian group. This is exactly the threshold described by This Court in *Brown:*

> **The proof may include, for example, specific evidence of past or present harrassment of members due to their associational ties, or of harrassment directed against the organization itself. A pattern of . . . hostility may be sufficient. *Id. at 74 L.Ed.2d 257.***

That petitioners are a religion that many would consider to be unorthodox has gained special consideration in the case of ***Eilers v. Palmer*, 575 F. Supp. 1259 (1984).** That court opined:

> **. . . [T]he supporters themselves, for various reasons, may have a desire for anonymity that might cause them to withhold support knowing that their names would be disclosed. *This is a particular concern in cases such as this where the supporters are likely to be members of unorthodox religious groups.*** (Emphasis added) ***Id.* at 1261.**

Despite the long decisional history of careful treatment of associational and first amendment rights, and despite its own recent *Snedigar* decision that affirmed these criteria, the state court ignored the record and ignored the right to a balancing test in this case.

B. *THE ISSUE OF DISCLOSURE OF MEMBERS OF A CHURCH IN DISCOVERY IS ONE OF CONSTITUTIONAL MAGNITUDE THAT SHOULD BE DECIDED BY THE UNITED STATES SUPREME COURT.*

The Washington court acknowledges that the issue of membership disclosure is constitutional in magnitude. The court's opinion in this case states:

> **In addition, Rhinehart contends that the decisions in these prior [Rhinehart] cases are ill-reasoned and in conflict with the law of other jurisdictions and should now**

be reversed. At this juncture, a reversal could only come from the Supreme Court. 59 Wash. App. at footnote #3. See App. herein.

Established legal authority recognizes an inevitable chilling effect on the right of association. In two U.S. Supreme Court cases, compelling disclosure of member or donors' names has been acknowledged to have a chilling effect upon freedom of association. ***Brown v. Socialist Workers,* 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed. 252 (1982); *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 1171 L.Ed.2d 1483 (1958).**

Other jurisdictions have ruled that there is constitutional protection against compelling production of membership and donor lists of a church. See ***Surinach v. Presquera de Busquets,* 604 F.2d 73 (1st Cir. 1979); *Church of Hakeem, Inc. v. Supreme Court,* 110 Cal.App.3d 384, 168 Cal.Rptr 13 (1980).**

The ***Britt*** court, *op cit,* held that the compelled disclosure of Church membership records violated the constitutional associational rights of church members, *even though* the disclosure issue arose in the context of pretrial discovery in civil litigation.

First amendment associational rights and the chilling effect of disclosure of membership lists have been recognized for secular organizations as well. ***Black Panther Party v. Smith,* 661 F.2d 1243 (5th Cir. 1960); *Ealy v. Little John,* 569 F.2d 219 (5th Cir. 1978); *Families Unidas v. Briscoe,* 544 F.2d 182 (5th Cir. 1976); *Bursey v. United States,* 466 F.2d 1059 (9th Cir. 1972).**

C. *IT IS CRITICAL THAT THIS COURT STOP EROSION OF ESTABLISHED AUTHORITY, AND AFFIRM THAT THE ASSOCIATIONAL RIGHT, AND NOT THE DISCOVERY RIGHT, IS THE PRIMARY RIGHT TO BE PROTECTED. SNEDIGAR* AT 163.

A protective order is only a solution to a discovery issue after information has been compelled, but it should be imposed only *after* the mandated balancing test.

Decades of authority in this area will not justify a protective order as a substitute for a First Amendment Balancing test.

Despite the existence of a protective order one court has held that membership lists are not discoverable in litigation. The court reasoned that once drawn into litigation, whether under protection order or not, members and donors would be likely to withdraw or reduce their support of an organization. ***Eilers v. Palmer*, 575 F. Supp. 1259 (Mn., 1984.)**

The Washington State ***Rhinehart*** cases stand alone among other jurisdictions, in ordering associational privacy of individuals to be invaded. In other jurisdictions, discovery is ordered in very narrow and specific situations where the groups have publicly advocated violence or other unlawful goals. ***Families Unidas*, 619 F.2d at 403.** Aquarian Foundation has never advocated violence and has sought only to practice its beliefs in peace.

Therefore, the state courts have trampled this religion's and its members' rights, by forcing it to choose between its very existence and invade its members' rights to associational privacy, or to forego litigation to stop the vicious media attacks against it.

This significant Constitutional issue deserves to be reviewed by the U.S. Supreme Court, to deny discovery of member lists, or at minimum, to require the balancing test – require the Seattle Times to justify its need for the member lists, and to demonstrate how it has attempted to obtain the discovery needed in alternative ways.

This issue has a far-reaching impact upon all religious, economic, and political groups, particularly minority groups. These groups are most critically protected by the First Amendment, and if they are not, then the First Amendment no longer affords private and free association.

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to the action dismissed for lack of merit? *YES.*

RCW 4.84.185 was enacted by Laws 1983, Chapter 127, Section 1. RCW 4.84.185 states in relevant part:

> ***In any civil action, the court having jurisdiction may, upon written findings of the judge that the action . . . was frivolous and advanced without reasonable cause, require***

> *that the nonprevailing party to pay the prevailing party the reasonable expenses . . . incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense . . .*

RCW 4.84.185 by its plain terms is limited to authorizing reasonable fees for the portion of any case found frivolous.

Washington State law requires that accounting for attorneys fees must be segregated where attorney fees are awarded for only some of the claims of a case. In ***Gaglidari v. Denny's Restaurants,* 117 Wash.2d 426 (1991),** the Supreme Court of Washington held that attorney fees must be segregated and limited to only the claims that were authorized by an award. Citing ***Travis v. Washington Horse Breeders,* 759 P.2d 418, 425 (Wash.1988),** a segregation of two different legal theories was ordered by the court in a cause of action where fees were awarded for just one legal theory. The court in *Travis* held that the party must **"separate the time spent on those theories essential to [one cause of action] and time spent on legal theories relating to the other causes of action."** *Id.* The Supreme Court of Washington also held in ***Nordstrom, Inc. v. Tampourlos,* 733 P.2d 208 (Wash. 1987)** that an award of attorney fees must only represent the services associated with the cause of action which granted the award. *Nordstrom* **at 212. The court stated that Nordstrom would have an unfair benefit if it was awarded fees for aspects of the suit which had nothing to do with the violation of the cause of action for which fees were awarded.**

THE TRIAL COURT FAILED TO SEGREGATE FEES, AND DEPRIVED PETITIONERS OF

PROPERTY WITHOUT DUE PROCESS AND IN VIOLATION OF EQUAL PROTECTION.

The judicial application of a statute may violate the Fourteenth Amendment Due Process and Equal Protection clauses when application of the law is arbitrary or when a protected group is arbitrarily treated differently from others.

The Due Process Clause requires that laws operate on all alike, and that individuals not be subject to the arbitrary exercise of government powers. ***Caldwell v. State of Texas*, 11 S.Ct. 224, 137 U.S. 692, 34 L.Ed. 816 (1891).** Deprivation of property by some unreasoned or unreasonable imposition of liability is a deprivation of Due Process. ***Pearson v. Northeast Airlines, Inc.*, C.A.N.Y. 1962, 309 F.2d 553, *cert. den.* 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720.**

Here, the state courts have departed from any rational reading of the state statute, and from their own prior pronouncements regarding how to read the statute. The $40,000.00 terms against Petitioners is based upon an arbitrary 50% division of fees between the issues in the case, and this arbitrary division violates the requirement by state law that actual time expended on each matter be segregated.

Equal Protection demands at minimum that a state must apply laws in a rational and nonarbitrary way, so that the application of the law rationally furthers some legitimate, articulated state purpose, and does not constitute invidious discrimination. ***Ciechon v. City of Chicago*, 686 F.2d 511 (C.A. Ill. 1982).** This clause prohibits discriminatory governmental action in administration of a law; it prohibits discriminatory enforcement of valid statutes. ***Britton***

v. Rogers, **631 F.2d 572 (C.A.Ark. 1980),** *cert. den.* **101 S.Ct. 2021, 451 U.S. 939, 68 L.Ed.2d 327.** *Shock v. Tester,* **405 F.2d 852 (C.A.Ark.,1969),** *cert. den.* **89 S.Ct. 1641, 394 U.S. 1020, 28 L.Ed.2d 45,** *reh. den.* **89 S.Ct. 2004, 395 U.S. 941, 23 L.Ed.2d 460.** Strict judicial scrutiny is required when a "suspect class" – including a religion – is treated differently than others in an enforcement action. ***Hanbron v. Epstein,*** **412 F. Supp. 256 (D.C. Md. 1976),** *aff'd* **97 S.Ct. 41, 429 U.S. 802, 50 L.Ed.2d 67.**

Here, the state court did not bother to make any findings to justify its departure from the state law that requires segregation of fees; it made an arbitrary award in violation of its own statute. It cannot pass any test, much less a test of strict scrutiny that requires a showing of a compelling state interest to justify the confiscatory fees awarded.

This court should review this issue where arbitrary action has penalized a litigant in a "suspect class" by awarding $40,000.00 in fees that are not authorized by the terms of the state statute when opposing counsel could segregate only approximately $7000.00 for the case that was found frivolous.

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES.*

THE "REASONABLE POSSIBILITY OF SUCCESS" CRITERION IS UNCONSTITUTIONALLY VAGUE TO USE FOR A FINDING OF FRIVOLITY.

The holding of the appellate court below is that the concept of frivolity in Washington State is not vague and unconstitutional:

> **[T]he concept of frivolity is neither vague, nor unconstitutional. A frivolous action is one that cannot be supported by any rational argument on the law or facts. 59 Wash. App. at 340.**

However, the same opinion goes on to apply a **totally different standard in justifying the findings that Aquarian Foundation's 1986 litigation was frivolous:**

> **The case is so devoid of merit that there is no reasonable possibility of success. 59 Wash. App. at 341.**

This second concept of frivolity allows a court to judge a litigant arbitrarily and subjectively. Litigants who dare to bring novel or minoritarian views for court review will have a smaller likelihood of success than other litigants; this second standard is vague and improperly penalizes litigants like Aquarian Foundation, who hold unpopular or minoritarian views. It allows a trial court to find frivolity and impose sanctions that may create a chilling effect or an economic barrier that will bar such litigants from the courts. These same litigants need the protection of the courts in order to continue to exist in a pluralistic society.

Due process is violated when a state penalizes resort to the courts in doubtful cases. *Missouri v. Chicago*, 36 S.Ct. 715, 241 U.S. 533, 60 L.Ed. 1148

(1916). In general, citizens are protected from arbitrary state action by the Due Process Clause. ***Zannino v. Arnold,* 531 F.2d 687 (C.A.Pa. 1976).**

In this case, the standard of "possibility of success" allows the state court to make a subjective determination. It inherently allows difficult, novel, and unpopular cases to be judged more harshly because they have a lesser "possibility of success." The standard allows arbitrary action depending upon the personal opinion of the judge or the conservative or liberal climate among the judiciary. This standard, then, is vague and arbitrary, and violates due process.

Because the state of Washington has two different standards to apply in finding whether a case is frivolous, the unequal enforcement of these standards results in the violation of Equal Protection. When there is an unequal enforcement of a standard and it is arbitrarily assigned to persons in a suspect category, such as religion, then Equal Protection is violated. ***Stone v. Chelan County Sheriff's Dept.*, 756 P.2d 736, 110 Wash.2d 806 (1968).**

Here, the state has analyzed the concept of frivolity and upheld it as constitutional, when it is articulated as "a rational argument on the law or on the facts." In this same case, the state has applied a completely different standard to petitioner, a religion. This completely different standard is no better than a subjective opinion of whether there is a "possibility of success". The state has not attempted to show why it would apply one standard for frivolity to petitioners and another when it reviews its

standards to determine if they pass constitutional muster. This is an arbitrary use of a subjective standard as to petitioners, and this is a violation of petitioners' Equal Protection rights under the United States Constitution.

A leading Washington case on the issue of frivolity, ***Streater v. White*, 26 Wash. App. 430, 613 P.2d 187 (1980)**, mixes both of the above concepts in defining frivolity in Washington State. It is this infusion of a subjective standard in the concept of frivolity that should be reviewed by This Court. Until it is reviewed, the state court is free to apply the subjective standard to litigants in an arbitrary manner, instead of consistently applying the objective, proper criteria of whether or not the case can be supported in fact or law.

CONCLUSION

THEREFORE, THE COURT IS URGED TO ACCEPT REVIEW OF THE SIGNIFICANT CONSTITUTIONAL ISSUES HEREIN.

DATED THIS 29th DAY OF SEPTEMBER, 1994.

LAW OFFICES OF JEAN SCHIEDLER-BROWN & ASSOCIATES, P.S.
JEAN SCHIEDLER-BROWN
WSBA No. 7753

APPENDICES

A. OPINION SOUGHT TO BE REVIEWED AND SUBSEQUENT ORDERS.....App. 1

1. *OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION 1, Rhinehart v. the Seattle Times,* 59 Wash. App. 332, 798 P.2d 1155 (1990).....App. 1

2. Order affirming decision after remand, May 3, 1993..... App. 15

3. Order denying Appellants' Motion for Reconsideration, December 6, 1993..... App. 17

4. Order denying Petition for Review to Washington State Supreme Court, July 6, 1994.....App. 19

B. CONSTITUTIONAL AND STATUTORY PROVISIONS CITED.....App. 21

1. *U.S. CONSTITUTION, AMENDMENT I* App. 21

2. *U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1*..... App. 22

3. *RCW 4.84.185*..... App. 23

59 Wash.App. 332

Keith Milton RHINEHART, a single person; The Aquarian Foundation, a Washington not-for-profit corporation, Appellants,

v.

The SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; Erik Lacitis and Jane Doe Lacitis, Respondents.

The AQUARIAN FOUNDATION, a not-for-profit corporation; Reverend Keith Milton Rhinehart, a single person; Linda Dunn, a married person, Appellants,

v.

The SEATTLE TIMES, INC., a Delaware corporation; Ross Anderson, Jane Doe Anderson, and his marital community, Respondents.

Nos. 22258-9-I, 22401-8-I.

Court of Appeals of Washington,
Division 1.

Aug. 13, 1990.

Reconsideration Denied Sept. 24, 1990.

Spiritual organization and its leader appealed from an order of the Superior Court, King County, which dismissed their actions against newspaper and its reporters for alleged defamation. The Court of Appeals, Grosse, Acting C.J., held that: (1) dismissal of libel action for willful failure by plaintiffs to comply with discovery orders requiring production of membership lists, donation records, and videotape of a certain performance, was not error where plaintiffs did not show some probability

that the requested disclosure would infringe upon organization's constitutional rights, especially in light of protective orders indicating that the documents could only be used for purposes of the litigation; (2) concept of "frivolity," for purposes of awarding attorney fees for bringing frivolous action, is not unconstitutionally vague; and (3) trial court did not abuse its discretion in awarding fees under statute governing frivolous actions or rule governing verification of pleadings where most of issues in defamation case had been raised and rejected in at least two prior cases and where case was so devoid of merit that there was no reasonable possibility of success.

Order in accordance with opinion.

Jean Schiedler-Brown, Seattle, for appellant, Keith Milton Rhinehart.

Bruce Johnson and Howard Stambor, Seattle, for respondent, Seattle Times.

GROSSE, Acting Chief Judge.

Appellants Keith Milton Rhinehart and The Aquarian Foundation appeal the trial court's order dismissing their actions against The Seattle Times, Inc., and its reporters Erik Lacitis (Rhinehart II – filed in 1982) and Ross Anderson (Rhinehart III – filed in 1986) for alleged defamation and the damages resulting therefrom. Rhinehart III was dismissed on summary judgment. Rhinehart II was dismissed for failure to obey the court's discovery order under CR 37.

Rhinehart is the leader of a Seattle-based spiritualist organization, The Aquarian Foundation. Rhinehart and The Aquarian Foundation (collectively referred to herein

as Rhinehart) have filed several complaints against the Times.

This consolidated appeal involves two of the cases which were consolidated in the trial court. "Rhinehart II" was a 1982 libel lawsuit based on articles written by Seattle Times reporter Erik Lacitis. "Rhinehart III" was a 1986 libel lawsuit based on articles written by Seattle Times reporter Ross Anderson. These suits were the second and third in a series of cases filed by Rhinehart against the Times. Rhinehart also filed actions against the Seattle based television station KIRO, Inc., and its owner. The previous cases and these new ones are basically a reargument of the same issues of defamation, discovery, and dismissal for failure to comply with discovery orders. Issues similar to those brought by this appeal are the subject of a recent Supreme Court opinion, *Snedigar v. Hoddersen*, 114 Wash.2d 153, 786 P.2d 781 (1990). Also at issue is the proper determination of attorney's fees.

In May of 1988, this court affirmed the dismissal of Rhinehart's first complaint (Rhinehart I) because of repeated refusals to comply with the trial court's discovery orders. *Rhinehart v. Seattle Times Co.*, 51 Wash.App. 561, 573-78, 754 P.2d 1243, *review denied*, 111 Wash.2d 1025 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989). That decision also held that the appeal was frivolous and in bad faith. After these lawsuits were filed, the Times sought discovery from Rhinehart. Again, Rhinehart resisted discovery and objected. A protective order was entered to protect Rhinehart's privacy interest and those of his church and membership,

yet he still failed to produce the requested documentation. The trial court heard many motions about the various requests for production of documents. Eventually the Times moved for summary judgment in both of these cases. These motions were heard and Rhinehart III was dismissed on summary judgment, dismissing the suit with prejudice and awarding the Times its fees and costs. The trial court initially reserved its decision in Rhinehart II. On May 11, 1988 the court entered an order awarding expenses and attorney's fees in Rhinehart III. In its findings the court held that the lawsuit was frivolous and advanced without reasonable cause, and further found that the suit was brought to harass and needlessly increase the cost of the litigation to the Times and other defendants. The court ordered Rhinehart to pay $40,000 in attorney's fees and $1,981.21 in costs based on the affidavit of counsel for the Times.[1] On May 13, 1988 the trial court dismissed Rhinehart II and awarded defendants attorney's fees incurred because of Rhinehart's refusal to obey its discovery order.

Rhinehart has not challenged any of the findings of fact or conclusions of law in this case. This is best shown by reference to counsel's argument at page 71 of the appellants' brief. In discussing *Streater v. White*, 26 Wash.App. 430, 613 P.2d 187 (1980), counsel argues that the challenges were to the findings of fact and not to the legal principles, whereas in this case, appellants are directly challenging the legal principles. Findings of fact to which no error is assigned are accepted as verities on

---

[1] The court reduced the requested amount of the fees from $66,699.02 to $40,000.

appeal. *Kelly v. Powell*, 55 Wash.App. 143, 146, 776 P.2d 996 (1989) (reconsideration granted 11-30-89); *see also State v. Harris*, 106 Wash.2d 784, 790, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). In addition, throughout the appellants' brief contentions are made without citation to authority. A contention not supported by authority or argument need not be considered on appeal. RAP 10.3(a)(5); *McKee v. American Home Prods. Corp.*, 113 Wash.2d 701, 705, 782 P.2d 1045 (1989); *Bremerton v. Shreeve*, 55 Wash.App. 334, 338, 777 P.2d 568 (1989). Appellate courts will only review a claimed error if it is included in an assignment of error, or clearly disclosed in the associated issue included in the brief. It must also be supported by argument and citation to legal authority. *BC Tire Corp. v. GTE Directories Corp.*, 46 Wash.App. 351, 355, 730 P.2d 726 (1986), *review denied*, 108 Wash.2d 1013 (1987); RAP 10.3(a)(5); RAP 10.3(g).

Although Rhinehart has failed to set out proper assignments of error, the manner in which the claimed errors are set forth and described in the brief is adequate to understand what has been asserted as error. The Times had no difficulty in responding directly to the issues raised and the failure tc properly assign error was not prejudicial to appellate review.[2]

---

[2] Counsel for Rhinehart should note that rules on appeal are to be followed and that the Court of Appeals is not required to decide an appeal on its merits where the rules have not been followed.

I.

Rhinehart first alleges the trial court erred in dismissing the complaint. Subsumed under this issue are most of the issues already determined by other courts in the prior Rhinehart cases. Specifically, Rhinehart reargues that the court erred in ordering Rhinehart to produce the membership lists, donation records, and the videotape of the performance at the Washington State Penitentiary in Walla Walla. Additionally, Rhinehart alleges that the court erred in dismissing the complaint for failure to comply with discovery orders.

Rhinehart contends that requiring the production of the material violates its First Amendment rights of freedom of association and free exercise of religion. This argument was previously rejected in *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 257, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); *Rhinehart v. Seattle Times Co.*, 51 Wash.App. at 569-72, 754 P.2d 1243; and *Rhinehart v. KIRO, Inc.*, 44 Wash.App. 707, 708, 723 P.2d 22 (1986), *review denied*, 108 Wash.2d 1008 (1987).

Rhinehart contends the trial court failed to balance the Foundation's rights against the Times' interest in defending the action. However, a protective order was entered indicating the documents could only be used for purposes of this litigation. Similar orders have been held adequate to protect the Foundation against discovery abuse. *See Rhinehart v. Seattle Times Co.*, 98 Wash.2d at 257, 654 P.2d 673; 51 Wash.App. at 571, 754 P.2d 1243; *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 709, 723 P.2d 22. There is no basis to distinguish this case from the prior cases on this issue.

Recently, in *Snedigar v. Hoddersen,* 114 Wash.2d 153, 786 P.2d 781 (1990), the Supreme Court adopted an analysis to be used in determining whether First Amendment privileges preclude or limit discovery. First, the party asserting the privilege must make an initial showing that disclosure would, with some probability, harm its First Amendment rights. If this preliminary showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevance and materiality of the information sought and to show that reasonable efforts to obtain this information by other means have been unsuccessful. If the burden is met the trial court then balances the parties' competing claims of privilege and need. At the Court of Appeals level in *Snedigar v. Hoddersen,* 53 Wash.App. 476, 768 P.2d 1 (1989), *aff'd in part, rev'd in part,* 114 Wash.2d 153, 786 P.2d 781 (1990), the court held that the party resisting discovery did not meet the burden of establishing the information sought was constitutionally privileged. The court, therefore, declined to reach the relevancy issue. The Supreme Court in its opinion indicated the Freedom Socialist Party had made the threshold showing of associational privilege and that it was necessary for the trial court to evaluate the relevancy of the disclosure and therefore balance the parties' competing interests.

Although both *Snedigar* opinions were filed after the trial court decision in these cases, the trial court essentially followed the same approach as that set out in the Supreme Court's decision in *Snedigar.* Indeed, under *Snedigar,* the second and third steps of relevancy evaluation and balancing would not be reached here because the findings and conclusions of the prior cases have already

determined that Rhinehart has not shown some probability that the requested disclosure would impinge on the Foundation's constitutional rights, especially in light of the protective orders.[3]

II.

Rhinehart further contends that the trial court erred in dismissing the action for failure to comply with the discovery order because the noncompliance was not willful and the Times was not prejudiced.

The trial court has broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order and its decision will not be overturned absent a manifest abuse of discretion. *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 710, 723 P.2d 22; *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 548 P.2d 558 (1976); *see also Anderson v. Mohundro*, 24 Wash.App. 569, 604 P.2d 181 (1979) (upholding dismissal of plaintiff's action because of willful and deliberate noncompliance with the trial court's discovery order). In the prior Rhinehart cases this court upheld dismissal of the complaints where the plaintiffs supplied vague or incomplete responses or failed to respond to interrogatories and requests for production following issuance of orders compelling discovery, subject to protective orders such as here. Here again, the record supports the conclusion that

---

[3] In addition, Rhinehart contends that the decisions in these prior cases are ill-reasoned and in conflict with the law of other jurisdictions and should now be reversed. At this juncture, a reversal could only come from the Supreme Court. *See State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984).

Rhinehart's violation of the discovery rules was willful and deliberate, *i.e.*, was done without reasonable excuse. *Rhinehart v. Seattle Times Co.*, 51 Wash. App. at 577, 754 P.2d 1243. The Times was prejudiced in its ability to prepare its defense and no less drastic action would have sufficed. *Rhinehart v. Seattle Times Co.*, 51 Wash.App. at 577, 754 P.2d 1243; *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 711, 723 P.2d 22. The trial court did not abuse its discretion in dismissing Rhinehart's complaint.

III.

Next, Rhinehart contends the trial court erred in awarding attorney's fees and costs and, further, even if fees and costs are allowable, a sufficient determination of a reasonable amount was not made by the trial court. Although not specifically set out in a challenge to the finding of fact, Rhinehart argues with the trial court's determination that his claims in Rhinehart III were frivolous in violation of RCW 4.84.185. Part of this attack deals with a challenge that the concept of "frivolity" is unconstitutional.

The decision to make an award of attorney's fees under RCW 4.84.185 is left to the discretion of the trial court and will not be disturbed in the absence of a clear showing of abuse. *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 131-33, 783 P.2d 82, *review denied*, 113 Wash.2d 1001, 777 P.2d 1050 (1989); *see also Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wash.2d 614, 625, 724 P.2d 356 (1986). A trial court cannot be said to abuse its discretion in awarding attorney's fees under RCW 4.84.185 if the facts alleged do not state a cause of action

that can be supported by any rational argument on the law or facts. *Camer v. Seattle Sch. Dist. 1*, 52 Wash.App. 531, 539, 762 P.2d 356 (1988), *review denied*, 112 Wash.2d 1006, *cert. denied*, ___ U.S. ___, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989).

This state has developed a clear standard for determining whether an appeal is frivolous and brought for the purpose of delay. *Millers Casualty Ins. Co. v. Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983); *Streater v. White*, 26 Wash.App. 430, 434, 613 P.2d 187 (1980). *See also Bill of Rights Legal Found. v. Evergreen State College*, 44 Wash.App. 690, 696-97, 723 P.2d 483 (1986). Unlike Rhinehart's argument to the contrary, the "concept of frivolity" is neither vague, nor unconstitutional. A frivolous action is one that cannot be supported by any rational argument on the law or facts. *Camer*, 52 Wash.App. at 539, 762 P.2d 356, *Bill of Rights Legal Found.*, 44 Wash.App. at 696-97, 723 P.2d 483. This standard requires the trial court to exercise its judgment in determining whether an action can be supported by any rational argument. It is not vague. *See State v. Worrell*, 111 Wash.2d 537, 544, 761 P.2d 56 (1988) (criminal statute is not unconstitutionally vague where statutory language lends itself to common sense interpretation and the phrase has been interpreted in case law providing additional guidance to its meaning). The burden of proving a statute unconstitutional is on the party challenging the statute. The burden on the challenging party is that the statute must be proven to be unconstitutional beyond a reasonable doubt. *State v. Brayman*, 110 Wash.2d 183, 193, 751 P.2d 294 (1988). Rhinehart has not met this test.

Rhinehart also challenges the determination by the trial court that there was a violation of CR 11. The determination of whether a violation of CR 11 has occurred is within the sound discretion of the trial court. *Doe v. Spokane & Inland Empire Blood Bank,* 55 Wash.App. 106, 110, 780 P.2d 853 (1989). If the court determines that a violation has occurred, the rule makes the imposition of sanctions mandatory. *Miller v. Badgley,* 51 Wash.App. 285, 301, 753 P.2d 530, *review denied,* 111 Wash.2d 1007 (1988). The trial court retains broad discretion regarding the nature and scope of sanctions which could range from a reprimand to the full award of attorney's fees and other appropriate penalties. *Badgley,* 51 Wash.App. at 303, 753 P.2d 530.

A plaintiff's complaint may subject the party to CR 11 sanctions if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal basis of the action. CR 11. The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Badgley,* at 299-300, 753 P.2d 530.

Most of the issues in this case have been raised and rejected in at least two prior cases. The remaining issues are not debatable. The case is so devoid of merit that there was no reasonable possibility of success. The trial court did not abuse its discretion in awarding fees under either RCW 4.84.185 or CR 11.

Next, we must determine whether the trial court abused its discretion by failing to create a sufficient record as to the amount of attorney's fees to permit a

proper review or, in the alternative, whether the record, if any before this court, shows the reasoning by which the trial court set the fees at the amount in the findings and conclusions. The issue has merit. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 596, 675 P.2d 192 (1983); *Progressive Animal Welfare Soc'y v. University of Wash.*, 54 Wash.App. 180, 186-87, 773 P.2d 114 (1989), *aff'd*, 114 Wash.2d 677, 790 P.2d 604 (1990). Unfortunately, the verbatim report of proceedings, if any, as to determination of fees, and why the trial judge set them or reduced them from the requested amount of $66,699 to $40,000, is not before the court. While the determination of the fees at trial is best left up to the trial court, that court must make a sufficient record to enable the appellate court to conduct a proper review. Because there is no record of the hearing before us in this case, we cannot undertake a proper review and must remand to the trial court.

The Times seeks the imposition of sanctions on appeal in the form of attorney's fees and costs pursuant to RAP 18.9(a). RAP 18.9(a) authorizes this court to impose sanctions against a party who brings an appeal that is frivolous and brought for the purpose of delay. *Millers Casualty Ins. Co. v. Briggs*, 100 Wash.2d at 15, 665 P.2d 887; *Streater v. White*, 26 Wash.App. at 434, 612 P.2d 187. Sanctions may include, as compensatory damages, an award of attorney's fees to the opposing party. *See* Comment, RAP 18.9; *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wash.App. at 690, 723 P.2d 483. In addition, if an appeal is found to be frivolous, this court can award CR 11 sanctions pursuant to RAP 18.7 against the party or his counsel filing the frivolous and

non-meritorious action. *See Layne v. Hyde*, 54 Wash.App. 125, 136, 773 P.2d 83, *review denied*, 113 Wash.2d 1016 (1989).

While the issues in this case have been raised again and again and rejected each time, there is one issue that has merit and that is how the trial court determined the reasonableness of the attorney's fees, an issue which we cannot determine on the record before us. Therefore, not all of the appeal can be said to be frivolous and request for fees on appeal will be denied.

The decision of the trial court is affirmed except as to the issue of the amount of attorney's fees. However, because the issue of attorney's fees has already been the subject of one hearing in the trial court and is a subject of this appeal, and because the history of this matter and related cases is such that further appeals appear certain, we find that the appropriate remedy is for this court to retain jurisdiction to refer this case to the trial court either for entry of additional findings on the determination of the issue of attorney's fees in accordance with *Bowers*, or in the alternative to have the record supplemented by filing the verbatim report of proceedings on the determination of the attorney's fees.

Therefore, it is hereby ordered that this matter is referred to the trial judge who entered the orders that are the subject of this appeal for entry of additional findings of fact on the issue of the proper amount of attorney's fees to be awarded to respondents for their defense of these matters through trial or, in the alternative, in its discretion, if the trial court finds that a verbatim report of the hearing on the issue of attorney's fees exists, and that

it is sufficient for this court to determine whether the award was properly considered by the trial court, then the trial court may order the supplementation of the record in this court. If the trial court decides to make additional findings, these findings shall be made from the record as presently constituted, unless the trial judge determines that additional evidence is necessary in order to comply with the principles set forth in this opinion. Any hearing hereon, the entry of the findings, or the supplementation of the record, shall be accomplished within 30 days of the filing of this opinion and order. After entry, the parties shall cause the verbatim report, the findings, and any objections thereto, to be immediately transmitted to this court for such further action as shall prove necessary.

BAKER and PEKELIS, JJ., concur.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

/s/ Walter E. Webster, Jr.
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Appellants,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

NO. 22258-9-I
consolidated with:
No. 22401-8-I

DIVISION ONE

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

(Filed
May 3, 1993)

GROSSE, J. – This case comes before this court after referral to the trial court for entry of findings of fact and conclusions of law to support the trial court's award of attorney fees to respondents. We have reviewed those findings and conclusions and affirm the award of attorney fees.[1]

The trial court correctly based its decision as to the amount of fees to award on application of the factors set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596, 675 P.2d 193 (1983), to the particular facts and circumstances of this case.

The decision of the trial court is affirmed.

/s/ Grosse, J.

WE CONCUR:

/s/ Baker, J.

Pekelis, A.C.J.

---

[1] Final action by this court was delayed due to the inadvertent transmittal of this case to the Supreme Court prior to final action here.

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTHON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Appellants,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

NO. 22258-9-I
consolidated with
No. 22401-8-I

DIVISION ONE

ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

(Filed
Dec. 6, 1993)

The appellants, Keith Milton Rhinehart, The Aquarian Foundation, and Linda Dunn, having filed a motion for reconsideration herein, and the Court having determined that it should be denied, now, therefore, it is hereby ORDERED that appellants' motion for reconsideration be, and the same hereby is denied.

DATED this 6th day of December, 1993.

FOR THE PANEL:

/s/ Grosse, J.
Presiding Judge

THE SUPREME COURT OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Petitioners,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

NO. 61231-5

ORDER

C/A NO. 22258-9-I (22401-8-I consol. w/22258-9-I)

(Filed July 6, 1994)

This matter came before Department II of the Court on its July 6, 1994, Motion Calendar on Petition for Review. Department II having considered the Petition and the files herein, and the five members of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of July, 1994.

/s/ James A. Andersen
CHIEF JUSTICE

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES: DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 4.84.185

4.84.185 Prevailing party to receive expenses for opposing frivolous action or defense. In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after an order of dismissal, order on summary judgment, or final judgment after the trial or other final order terminating the action as to the prevailing party. In no event may such motion be filed more than thirty days after entry of the order. The judge shall consider the action, counterclaim, cross-claim, third party claim, or defense as a whole.

The provisions of this section apply unless otherwise specifically provided by statute. [1987 c 212 § 201; 1983 c 127 § 1.]

Supreme Court, U.S.
FILED
NOV 1 1994
OFFICE OF THE CLERK

No. 94-599

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KEITH MILTON RHINEHART, a single person; and THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS, and JANE DOE LACITIS,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, Division I, of the State of Washington

---

BRIEF IN OPPOSITION

BRUCE E. H. JOHNSON *
HOWARD STAMBOR
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Respondents
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT	8
I. PETITIONERS' CONSTITUTIONAL CHALLENGE TO CIVIL DISCOVERY AND THE PROTECTIVE ORDERS IS BOTH STALE AND INSUPPORTABLE	8
II. PETITIONERS' CLAIM THAT FEES WERE NOT AWARDED FOR RESPONDENTS' DEFENSE OF *RHINEHART III* IS CONTRADICTED BY THE TRIAL COURT RECORD	12
III. PETITIONERS' CHALLENGE TO THE "CONCEPT OF FRIVOLITY" RAISES NO SUBSTANTIAL FEDERAL ISSUE	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Aquarian Foundation v. Edwards & Barbieri, No. 20268-5-I (Wash. App. Nov. 21, 1988), *rev. denied*, 112 Wash. 2d 1003, *cert. denied*, 493 U.S. 813 (1989) 3

Aquarian Foundation v. Washington State, 1991 U.S. Dist. LEXIS 16569 (W.D. Wash. Aug. 21, 1991), and 1991 U.S. Dist. LEXIS 16571 (W.D. Wash. Oct. 17, 1991), *aff'd*, 19 F.3d 25 (9th Cir.), *cert. denied*, 114 S. Ct. 2744 (1994) 5

Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313 (1971) 10

Doe v. Puget Sound Blood Center, 117 Wash. 2d 772, 819 P.2d 370 (1991) 10

Edwards & Barbieri v. Aquarian Foundation, No. 17405-3-I (Wash. App. Aug. 28, 1986), *rev. denied*, 107 Wash. 2d 1027, *app. dismissed*, 484 U.S. 892 (1987), *reh. denied*, 484 U.S. 1083 (1988) 3

Herr v. Aquarian Foundation, Inc., Adv. No. 80-0871 (Bankr. W.D. Wash. Feb. 28, 1984), *aff'd*, No. C84-496V (W.D. Wash. Sept. 7, 1984), *app. dismissed*, No. 84-4369 (9th Cir. Oct. 11, 1985) .. 5

Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 (1952) 10

Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987) 13

Pappas v. Holloway, 114 Wash. 2d 198, 787 P.2d 30 (1990) 11

Rhinehart v. KIRO, Inc., 44 Wash. App. 707, 723 P.2d 22 (1986), *rev. denied*, 108 Wash. 2d 1008, *app. dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 484 U.S. 805 (1987) 3

Rhinehart v. KIRO, Inc., No. 22546-4-I (Wash. App. Aug. 8, 1989), *rev. denied*, 113 Wash. 2d 1035, 785 P.2d 825, *cert. denied*, 498 U.S. 850 (1990) 4

Rhinehart v. Powers, 45 Wash. App. 1005 (1986) .. 3

Rhinehart v. Seattle Times, 15 Med. L. Rep. (BNA) 1509 (Wash. Super. Ct. May 11, 1988) .. 2

TABLE OF AUTHORITIES—Continued

Page

Rhinehart v. Seattle Times, 15 Med. L. Rep. (BNA) 1510 (Wash. Super. Ct. May 13, 1988) .. 2
Rhinehart v. Seattle Times, 122 Wash. 2d 1027, 866 P.2d 40 (1993) 4
Rhinehart v. Seattle Times, 124 Wash. 2d 1010, 879 P.2d 293 (1994) 2, 8
Rhinehart v. Seattle Times, 69 Wash. App. 1066 (1993) 4
Rhinehart v. Seattle Times, 69 Wash. App. 1067 (1993) 2, 7
Rhinehart v. Seattle Times Co., 114 S. Ct. 1544 (1994) 2, 9
Rhinehart v. Seattle Times Co., 467 U.S. 1230 (1984) 2, 9
Rhinehart v. Seattle Times Co., 490 U.S. 1015 (1989) 2, 9
Rhinehart v. Seattle Times Co., 51 Wash. App. 561, 754 P.2d 1243, *rev. denied*, 111 Wash. 2d 1025 (1988), *app. dismissed*, 490 U.S. 1015, *reh. denied*, 490 U.S. 1102 (1989) 4
Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984) .. 2, 9, 11
Rhinehart v. Seattle Times, Inc., 58 Wash. App. 1060 (1990) 4
Rhinehart v. Seattle Times, Inc., 59 Wash. App. 332, 798 P.2d 1155 (1990), *rev. denied*, 124 Wash. 2d 1010, 879 P.2d 293 (1994) 2, 7, 10, 11, 14
Rhinehart v. Stauffer, 638 F.2d 1169 (9th Cir. 1979) 4
Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) .. 1, 9, 12
Snedigar v. Hoddersen, 114 Wash. 2d 153, 786 P.2d 781 (1990) 10, 11
In re Thomas, 54 B.R. 287 (Bankr. D. Hawaii 1985) 5
WSPIE & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 858 P.2d 1054 (1993) 14

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES	Page
S. Ct. R. 10.1	8
Fed. R. Civ. P. 11	4
Wash. CR 11	2, 7
RCW 4.84.185	2
MISCELLANEOUS	
J. Bartlett and J. Kaplan, eds., *Bartlett's Familiar Quotations* 754 (16th ed. 1992)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-599

KEITH MILTON RHINEHART, a single person; and THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS, and JANE DOE LACITIS,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, Division I, of the State of Washington

---

BRIEF IN OPPOSITION

Respondents [1] ask that the Court deny the writ of certiorari petitioners have requested.

COUNTER-STATEMENT OF THE CASE

More than a decade ago these petitioners' first defamation lawsuit against respondents was the subject of this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In the years since, petitioners have filed

---

[1] Blethen Corporation, a privately-held corporation, owns 50.5% and Knight-Ridder Investment Co., a company that is affiliated with Knight-Ridder Newspapers, Inc., a publicly-held corporation, owns 49.5% of the common voting stock of respondent Seattle Times Company.

three unsuccessful petitions seeking certiorari in that case.[2]

In addition to this consolidated case,[3] petitioners have brought several other frivolous lawsuits and appeals

[2] Since 1980 petitioners have filed three defamation lawsuits against respondents. Their first lawsuit (hereafter "*Rhinehart I*") against respondents was the subject of the 1984 opinion by this Court, which affirmed the decision by the Washington Supreme Court in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984), and of the three unsuccessful petitions for certiorari that have been filed at five-year intervals by these same petitioners. *See, e.g., Rhinehart v. Seattle Times Co.*, 467 U.S. 1230 (1984); *Rhinehart v. Seattle Times Co.*, 490 U.S. 1015 (1989); *Rhinehart v. Seattle Times Co.*, 114 S. Ct. 1544 (1994). This Petition for Certiorari involves their second and third lawsuits against respondents (hereafter "*Rhinehart II*" and "*Rhinehart III*"), which were commenced in 1982 and 1986, respectively, and were later consolidated by the trial court.

[3] Petitioners filed these two defamation lawsuits in King County Superior Court in Seattle. The first (*Rhinehart II*) alleged that the newspaper had defamed petitioners when it published an article about the former Foundation member who was the subject of the Foundation's unsuccessful Bankruptcy Court action that was dismissed after Rhinehart appeared at his deposition dressed in a gorilla costume. The other action (*Rhinehart III*) involved claims of defamation brought by Rhinehart, the Foundation, and Linda Dunn (a Foundation officer) because the newspaper had reported on and quoted from this Court's May 1984 decision upholding the protective order issued in *Rhinehart I*. The trial court dismissed the claims and awarded sanctions in *Rhinehart II* after petitioners repeatedly defied discovery orders. *Rhinehart v. Seattle Times*, 15 Med. L. Rep. (BNA) 1510 (Wash. Super. Ct. May 13, 1988). The trial court ruled that the claims in *Rhinehart III* were frivolous and were brought in violation of RCW 4.84.185 (a statute designed to deter frivolous litigation) and Washington Civil Rule 11 and awarded respondents approximately $42,000 in sanctions. *Rhinehart v. Seattle Times*, 15 Med. L. Rep. (BNA) 1509 (Wash. Super. Ct. May 11, 1988). The Washington Court of Appeals affirmed these rulings. *Rhinehart v. Seattle Times, Inc.*, 59 Wash. App. 332, 798 P.2d 1155 (1990) (published ruling); *Rhinehart v. Seattle Times*, 69 Wash. App. 1067 (1993) (unpublished decision). The Washington Supreme Court denied review. *Rhinehart v. Seattle Times*, 124 Wash. 2d 1010, 879 P.2d 293 (1994).

against media defendants and others in the courts of the State of Washington [4] and in the federal

[4] In addition to this case (*Rhinehart II* and *Rhinehart III*) petitioners have filed at least six other frivolous lawsuits and frivolous appeals in the Washington courts.

First, petitioners defied discovery orders in a libel lawsuit that they had filed against a Seattle television station (KIRO), the Tacoma News-Tribune, and others. Petitioners argued their lawsuits were exempt from the normal rules of civil discovery and forced the trial court to dismiss their claims. They appealed and lost in the Washington Court of Appeals (which ruled the arguments "specious" and "without merit"). The Washington Supreme Court and this Court refused review. *Rhinehart v. KIRO, Inc.*, 44 Wash. App. 707, 723 P.2d 22 (1986), *rev. denied*, 108 Wash. 2d 1008, *app. dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 484 U.S. 805 (1987). In a related case, the Washington Court of Appeals affirmed the dismissal of a similar set of claims brought by Rhinehart. *Rhinehart v. Powers*, 45 Wash. App. 1005 (1986) (unpublished decision).

Second and third, between 1985 and 1989, petitioners also resisted discovery orders in a collection action filed by their former attorneys in *Rhinehart I*. Their defiance resulted in a default judgment and an award of sanctions issued by the Washington Court of Appeals and upheld by the Washington Supreme Court and this Court on further review. *Edwards & Barbieri v. Aquarian Foundation*, No. 17405-3-I (Wash. App. Aug. 28, 1986), *rev. denied*, 107 Wash. 2d 1027, *app. dismissed*, 484 U.S. 892 (1987), *reh. denied*, 484 U.S. 1083 (1988). Two years later, in supplemental proceedings, petitioners again refused to comply with discovery, again sustained sanctions, again sought further appellate review, and again lost, with the Washington Court of Appeals imposing sanctions as a consequence of petitioners' frivolous appeal and the Washington Supreme Court and this Court refusing further review. *Aquarian Foundation v. Edwards & Barbieri*, No. 20268-5-I (Wash. App. Nov. 21, 1988), *rev. denied*, 112 Wash. 2d 1003, *cert. denied*, 493 U.S. 813 (1989).

Fourth, the Washington Court of Appeals awarded sanctions in respondents' favor as a result of petitioners' refusals to comply with discovery orders in *Rhinehart I* and the subsequent frivolous appeal. The court also affirmed the dismissal of petitioners' claims, held that petitioners' appeal was frivolous and that "the issues are devoid of merit with no reasonable possibility of reversal," and ordered the case again remanded to the Superior Court to deter-

courts.[5] The current Petition involves petitioners' second and third defamation lawsuits brought against respond-

mine the amount of the sanctions to be imposed upon petitioners. The Washington Supreme Court then denied review, and this Court dismissed the consequent appeal. *Rhinehart v. Seattle Times Co.*, 51 Wash. App. 561, 754 P.2d 1243, *rev. denied*, 111 Wash. 2d 1025 (1988), *app. dismissed*, 490 U.S. 1015, *reh. denied*, 490 U.S. 1102 (1989).

Fifth, the *Rhinehart I* matter was again remanded to the trial court, which reviewed respondents' time records and issued a sanctions award against petitioners, who again appealed. On August 13, 1990, the Washington Court of Appeals rejected petitioners' various constitutional and statutory challenges and affirmed all of the trial court rulings except for its determination of the amount of attorneys' fees. *Rhinehart v. Seattle Times, Inc.*, 58 Wash. App. 1060 (1990) (unpublished decision). Although it retained jurisdiction, the Court of Appeals again referred the case back to the trial court to supplement the record with more specific findings regarding the fee award. Those findings were entered, petitioners again appealed, and the Washington Court of Appeals again affirmed. *Rhinehart v. Seattle Times*, 69 Wash. App. 1066 (1993) (unpublished decision). The court then denied reconsideration and petitioners filed a petition for review, which the Washington Supreme Court denied on December 1, 1993. *Rhinehart v. Seattle Times*, 122 Wash. 2d 1027, 866 P.2d 40 (1993). This Court later denied certiorari. *Rhinehart v. Seattle Times Co.*, 114 S. Ct. 1544 (1994).

Sixth, petitioners filed a second defamation suit against KIRO and again refused to comply with discovery, which again forced the trial court to dismiss their claims because of their deliberate noncompliance with discovery orders. This decision was again affirmed by the Washington Court of Appeals, which imposed a sanctions award, and was sustained on further appellate review. This Court denied certiorari in 1990. *Rhinehart v. KIRO, Inc.*, No. 22546-4-I (Wash. App. Aug. 8, 1989), *rev. denied*, 113 Wash. 2d 1035, 785 P.2d 825, *cert. denied*, 498 U.S. 850 (1990).

[5] Petitioners have brought at least three frivolous lawsuits in the federal courts. In *Rhinehart v. Stauffer*, 638 F.2d 1169 (9th Cir. 1979), for example, the court affirmed a trial court decision dismissing a defamation action under Fed. R. Civ. P. 11 because petitioner Rhinehart and his attorney had relied "upon friends to

ents. They complain that the Washington Court of Appeals has affirmed a trial court decision that ordered them to reimburse respondents for the expenses, including rea-

---

convey information in a casual way" and no investigation into the merits of the case had been undertaken.

Later, petitioners brought claims in the United States Bankruptcy Court in Seattle against a former Aquarian Foundation member who (as another bankruptcy court observed) had left the fold when he "found questionable the Foundation's practice of passing off cheap jewelry as 'sacred' gems in return for donations ranging anywhere from $25.00 to $1,000.00." *In re Thomas*, 54 B.R. 287, 290 (Bankr. D. Hawaii 1985). The United States Bankruptcy Court in Seattle dismissed those claims because of petitioners' "flagrant and intentional violation of the rules of discovery" and held that petitioners' misconduct, which included Rhinehart's appearance at his deposition dressed in a gorilla costume, was designed to make a "mockery of the Court and of the judicial process." Rejecting petitioners' constitutional attacks, the United States District Court affirmed the decision and the Ninth Circuit dismissed petitioners' appeal. *Herr v. Aquarian Foundation, Inc.*, Adv. No. 80-0871 (Bankr. W.D. Wash. Feb. 28, 1984), *aff'd*, No. C84-496V (W.D. Wash. Sept. 7, 1984), *app. dismissed*, No. 84-4369 (9th Cir. Oct. 11, 1985).

More recently, petitioners filed a civil rights action in United States District Court in Seattle against the State of Washington, arguing that enforcement of the Civil Rules violated their claimed constitutional right to pursue frivolous litigation. Because the claims against the State were absolutely barred by the Eleventh Amendment, Chief Judge Barbara J. Rothstein dismissed their action with prejudice, ruled that the claims were frivolous, and imposed sanctions. On February 15, 1994, the United States Court of Appeals for the Ninth Circuit agreed and affirmed her rulings in their entirety. The Ninth Circuit also imposed $1,000 in additional sanctions because the appeal was frivolous, ruling that petitioners had "failed to cite any authority to support the result sought in this case" and rejecting their argument that the Eleventh Amendment immunity issue was "in any way unsettled," given that it "has been consistently rejected for over a hundred years." As the court noted: "we and the Supreme Court have consistently rejected each of Appellants' arguments." *Aquarian Foundation v. Washington State*, 1991 U.S. Dist. LEXIS 16569 (W.D. Wash. Aug. 21, 1991), and 1991 U.S. Dist. LEXIS 16571 (W.D. Wash. Oct. 17, 1991), *aff'd*, 19 F.3d 25 (9th Cir.), *cert. denied*, 114 S. Ct. 2744 (1994).

sonable attorneys' fees, that respondents incurred in responding to one of their frivolous cases.

The facts underlying the Petition are quite simple. The subjects of this Petition are two defamation lawsuits that petitioners brought in King County (Washington) Superior Court against respondents. In 1987 these suits were consolidated by King County Superior Court Judge Sharon S. Armstrong and consolidated on appeal.

In one lawsuit (*Rhinehart II*, filed in 1982) petitioners claimed that the newspaper had defamed them when it published an article about the former Foundation member who later became the target of the Foundation's unsuccessful Bankruptcy Court action that was dismissed after Rhinehart's appearance at his deposition dressed in a gorilla costume.[6] In this case, as in *Rhinehart I*, petitioners claimed as damages their alleged lost donations and membership sales. SCP 15-26.[7]

The other action (*Rhinehart III*, filed in 1986) involved claims of defamation brought because a newspaper article had reported this Court's 1984 decision upholding the protective order issued in *Rhinehart I*. Petitioners apparently disagreed with respondents' reliance upon the Court's language and the allegations in their own pleadings in *Rhinehart I*—and sought to hold respondents liable for these quotations. SCP 4980-5331.

---

[6] *See* discussion of *Herr* case, footnote 5, *supra*. The Petition makes several misstatements of fact about the factual background underlying the claims in *Rhinehart II*. *See* Petition at 3-6. Rather than belabor those details, we would simply note that the record contains detailed and uncontradicted evidence supporting respondents' entitlement to summary judgment, which directly contradicts these factual assertions. Judge Armstrong concluded that the summary judgment motion was moot because petitioners had repeatedly defied her discovery orders.

[7] The record below includes the Clerk's Papers ("CP"), the Supplemental Clerk's Papers ("SCP"), the Second Supplemental Clerk's Papers ("SSCP"), and the Report of Proceedings ("RP").

After unsuccessful efforts to obtain discovery, respondents moved for summary judgment in both *Rhinehart II* and *Rhinehart III*. SSCP 1-3; SCP 1700-2003; 2004-2327; 2328-2624; 2658-64; 2665-67; 4367-69; 4425-74; 4980-5331; 5332-34. The trial court determined that the summary judgment motion in *Rhinehart II* was moot and instead dismissed the claims because petitioners had repeatedly defied its discovery orders. SCP 404-09; 1587-1612; 2625-26.

In *Rhinehart III* Judge Armstrong granted respondents' motion for summary judgment, ruled that the claims in *Rhinehart III* were frivolous and were brought "to harass and to needlessly increase the cost of this litigation to defendants" and in violation of RCW 4.84.185 and Washington Civil Rule ("CR") 11, and awarded respondents approximately $42,000 for the expenses, including attorneys' fees, that they had incurred in defending *Rhinehart III*. SCP 5368-74; 4623-26. Petitioners immediately moved for clarification and reconsideration and submitted a rambling, incoherent affidavit by Rhinehart that called respondents "venomous scoundrels" and accused the trial court of "treachery." SCP 4624-48. The trial court denied petitioners' motions. SCP 4731-32; 4733-35.

Petitioners then appealed to the Washington Court of Appeals, which in 1990 affirmed both dismissals and the findings that *Rhinehart III* was in violation of RCW 4.84.185 and CR 11. The court remanded the case, however, for additional findings regarding the fees incurred in resisting the frivolous claims. *Rhinehart v. Seattle Times, Inc.*, 59 Wash. App. 332, 798 P.2d 1155 (1990). After the trial court entered the additional findings, petitioners again appealed to the Court of Appeals, which affirmed in an unpublished ruling and denied two motions for reconsideration. *Rhinehart v. Seattle Times*, 69 Wash. App. 1067 (1993) (unpublished decision). Petitioners unsuccessfully sought review in the Washington Supreme

Court. *Rhinehart v. Seattle Times, Inc.*, 124 Wash. 2d 1010, 879 P.2d 293 (1994).

ARGUMENT

This Petition for Certiorari seeks to raise a constitutional challenge to an award of reasonable attorneys' fees prompted by one of petitioners' many frivolous lawsuits and appeals during the past fourteen years. Petitioners do not, however, present any arguments that satisfy the standards of Supreme Court Rule 10.1(b) and (c).

I. PETITIONERS' CONSTITUTIONAL CHALLENGE TO CIVIL DISCOVERY AND THE PROTECTIVE ORDERS IS BOTH STALE AND INSUPPORTABLE.

Now, approximately twelve years after the Washington Supreme Court first held that respondents' discovery requests sought highly relevant information and that petitioners' objections were without merit, petitioners have filed yet another petition for certiorari presenting this same issue and again insist that they may pursue multi-million damage claims while refusing discovery into the basis for their claims. Petition at 11-19. Rather than satisfy the standards required by the Court for granting a writ of certiorari, however, petitioners have offered nothing more than Yogi Berra's "déjà vu all over again." [8]

More than a dozen years ago, petitioners cited these same cases and raised the identical arguments during their first appeal of their first defamation lawsuit against respondents, *Rhinehart I*. In that case, petitioners alleged that certain newspaper articles by respondents had resulted in a drop in Aquarian Foundation membership and donations. *Rhinehart I* was the subject of this Court's 1984 ruling on the constitutionality of a protective order (identical to the order entered in this case, SCP 404-06) that accompanied the companion discovery order relating

---

[8] *See* J. Bartlett and J. Kaplan, eds., *Bartlett's Familiar Quotations* 754 (16th ed. 1992).

to allegations of lost memberships and donations (again, identical to the order that petitioners challenge here, SCP 1587-1612).

The Washington Supreme Court ruled that the trial court had not abused its discretion in entering a protective order limiting respondents' First Amendment rights and a discovery order directed to the issue of lost donations and memberships, because there was "no showing that the protective order is inadequate to prevent any abuse threatened by the defendants":

> The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.[9]

This Court unanimously affirmed the constitutionality of the protective order.[10] Meanwhile, the Court rejected petitioners' challenge to the ruling that upheld the discovery order.[11]

Then, at five-year intervals in *Rhinehart I*, petitioners filed two more unsuccessful petitions for certiorari with this Court, raising again the same issues and citing the same cases.[12] In addition, they also filed at least seven

---

[9] *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 257-58, 654 P.2d 673, 690-91 (1982).

[10] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

[11] *Rhinehart v. Seattle Times Co.*, 467 U.S. 1230 (1984).

[12] *See Rhinehart v. Seattle Times Co.*, 490 U.S. 1015 (1989); *Rhinehart v. Seattle Times Co.*, 114 S. Ct. 1544 (1994).

unsuccessful petitions for certiorari and appeals with the Court in connection with their cases against other defendants, in which they also asserted a constitutional exemption from civil discovery and claimed that the protective orders fashioned by various trial courts were insufficient to protect their claimed constitutional rights.[13]

This consolidated case involves (at least) the eleventh appeal that petitioners have filed in which they have offered the same cases and the same arguments that were rejected by the courts in their first appeal in *Rhinehart I*. Apparently petitioners believe they are entiled to importune this Court for yet another opportunity to renew the same discredited arguments. To adopt petitioners' position would create endless appeals by rewarding stamina and stubbornness rather than legal merit.[14]

Petitioners' constitutional challenge is also wholly without merit. Although petitioners ask the Court to require as a matter of federal constitutional law that the Washington courts adopt a "balancing test" in these circumstances, the standards adopted in *Rhinehart I* (which the Washington courts followed here) were such a balancing test. *See Doe v. Puget Sound Blood Center*, 117 Wash. 2d 772, 778, 819 P.2d 370, 374 (1991). Indeed, in this case, the Washington Court of Appeals expressly applied the balancing test set forth in *Snedigar v. Hoddersen*, 114 Wash. 2d 153, 786 P.2d 781 (1990), which petitioners claim is the appropriate rule. *See* Opinion, 59 Wash. App. at 337-38, 798 P.2d at 1159; Petition at 11-13.

Even if the *Rhinehart* cases have not specifically followed the *Snedigar* rule, moreover, it is important to

---

[13] *See* cases cited in Footnotes 4 and 5, *supra*.

[14] "Permitting repeated litigation of the same issue . . . reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.'" *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971) (quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)).

note that *Snedigar* did not involve the fundamental fairness principle at issue here: petitioners' conceded "attempt[] to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." *Rhinehart I*, 98 Wash. 2d at 257-58, 654 P.2d at 691.[15] As the Washington Court of Appeals recognized, the trial court's orders complied with *Snedigar* because the record failed to demonstrate **any** probability that compliance with discovery would harm petitioners' constitutional interests, given the entry of a protective order forbidding disclosure of the information. *See* Opinion, 59 Wash. App. at 338, 798 P.2d at 1159.[16]

Moreover, even if petitioners could demonstrate some harm not resolved by the protective order, the discovery orders were (as the Washington courts concluded) clearly appropriate under *Snedigar*. The discovery went to "the 'heart' of the matter." *Snedigar*, 114 Wash. 2d at 165, 786 P.2d at 786. *See, e.g.*, RP, Mar. 1, 1988, at 91 (information "is critical to the case"); SCP 4631-32 (noncompliance prejudiced defense). Also, there was no alternate source for the information. *See Snedigar*, 114 Wash. 2d at 165, 786 P.2d at 786-87.[17]

---

[15] Indeed, under Washington law, even well-established privileges are waived when a litigant files suit based upon the allegedly privileged information. *See Pappas v. Holloway*, 114 Wash. 2d 198, 203-09, 787 P.2d 30, 34-37 (1990) (case decided one week after *Snedigar*).

[16] Indeed, the Washington Supreme Court has held that, in these circumstances, the protective order fully protected petitioners' "legitimate interests in privacy and association insofar as was possible without denying the defendants the right to develop their defenses." *Rhinehart I*, 98 Wash. 2d at 257-58, 654 P.2d at 691.

[17] For example, petitioners offered a bookkeeper who would purportedly testify to total numbers claimed as damages, but respondents showed this alternative was "plainly inadequate" because "raw numbers are meaningless as an indication of *why* plaintiffs' contributions and memberships have declined." SCP 1381-95 (em-

In the final analysis, however, the application of Washington's balancing test in these circumstances was a matter of trial court discretion. As this Court noted more than a decade ago in *Rhinehart I*, "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36. Here the Washington trial court has ruled and the Washington Court of Appeals has affirmed that the requested discovery is appropriate and necessary and that the protective order shields petitioners from any claimed constitutional dangers. When it rejected an earlier constitutional challenge relating to the scope of discovery in *Rhinehart I*, this Court stated that "[i]t is sufficient . . . that the highest court in the State found no abuse of discretion in the trial court's decision . . . ." *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37.

II. PETITIONERS' CLAIM THAT FEES WERE NOT AWARDED FOR RESPONDENTS' DEFENSE OF *RHINEHART III* IS CONTRADICTED BY THE TRIAL COURT RECORD.

Petitioners' Fourteenth Amendment argument (Petition at 19-22) about the size of the sanctions award is based on their claim that respondents' fee award in *Rhinehart III* actually includes reimbursement for work performed in defense of *Rhinehart II*. Their claim is directly contradicted by the findings of the trial court. Thus, they mischaracterize the facts in the record when they suggest that the fee award in *Rhinehart III* is excessive as a matter of law and that the trial court failed to distinguish between *Rhinehart II* and *Rhinehart III* when it awarded attorneys' fees as sanctions in *Rhinehart III*. The record

---

phasis in original). The trial court agreed, noting that "the causal link can only be proven or disproven by talking to the individuals." RP, Mar. 1, 1988, at 10. The court also suggested that petitioners could avoid their problems merely by dropping the damage claims for loss of memberships and donations but petitioners refused. RP, Jan. 22, 1988, at 20.

shows that all claims in *Rhinehart III* were dismissed with prejudice and that respondents requested and were awarded their fees only for *Rhinehart III*, as permitted by RCW 4.84.185 and CR 11. SCP 4485-4531; 4600-07; 4623-26; 4627-33; 4709-30; 4733-35; 5368-74.

Furthermore, the trial court's 1990 Findings Pursuant to Reference by the Court of Appeals ("Findings")[18] also establish that fees were awarded in the "1986 cause" (*i.e.*, *Rhinehart III*) only. *See* Findings at 1-2. In making its determination, the trial court reviewed in detail the DeVore Affidavit submitted by respondents (SCP 4485-4531)[19] and identified "itemized time entries for the work performed **in this matter**." *Id.* at 2 (emphasis added). The trial court then reduced respondents' fee award by more than one-third from the lodestar number, and thus eliminated any alleged "unnecessary effort" or "duplication of time spent in related litigation"—*i.e.*, in defending the claims asserted in *Rhinehart II*. *Id.* at 2, 4.

After considering all the factors set forth in Washington RPC 1.5(a),[20] the trial court found:

> [D]efendants' request for $40,000 in attorneys fees and $1,981.21 in costs incurred **in defending plaintiffs' frivolous claims**[21] is reasonable.

Id. at 4 (emphasis added). The court added:

---

[18] The Findings are part of the record in the Washington Court of Appeals.

[19] Despite petitioners' assertions to the contrary (Petition at 7-8, 19-22), respondents' attorneys in fact segregated their time and expenses incurred defending *Rhinehart II* from those incurred defending *Rhinehart III*. Where a particular task applied to both lawsuits equally, moreover, the fees were split equally between the two matters. SCP 4600-07.

[20] The Findings also belie petitioners' suggestion (Petition at 20) that the trial court somehow ignored Washington law, as reflected in cases such as *Nordstrom, Inc. v. Tampourlos*, 107 Wash. 2d 735, 733 P.2d 208 (1987). *See* Findings at 5.

[21] The only claims that were found to be frivolous were those asserted in *Rhinehart III*.

> This conclusion is based on my independent determination, in consideration of all the circumstances of this case, and **is not reached solely by reference to the time entries of defendants' attorneys.**

Id. at 5 (emphasis added). Petitioners' assertion that the trial court abused its discretion is thus contradicted by the Findings themselves.

III. PETITIONERS' CHALLENGE TO THE "CONCEPT OF FRIVOLITY" RAISES NO SUBSTANTIAL FEDERAL ISSUE.

Petitioners disagree with the trial court's exercise of discretion in awarding sanctions in *Rhinehart III*, claiming "the concept of frivolity," as applied by Washington's courts, is somehow "vague and arbitrary." Petition at 22-25. Their argument, however, is completely unintelligible [22] and may be ignored.

Petitioners' argument also presents no substantial federal issue. The trial court record contains no evidence to support their contention that the sanctions awarded in this case were designed to punish a legitimate effort "to bring novel or minoritarian views for court review." Petition at 23. *Rhinehart III*, it should be remembered, was an attempt to hold respondents liable merely for publishing **this Court's 1984 ruling in Rhinehart I.** Petitioners'

---

[22] Petitioners criticize the Washington Court of Appeals' definition of a frivolous action—*i.e.*, a case that "is so devoid of merit that there is no reasonable possibility of success"—by contrasting it with a slightly different formulation of the same rule—*i.e.*, an action "that cannot be supported by any rational argument on the law or facts"—which they inexplicably suggest is a "completely different" and subjective standard. Opinion, 59 Wash. App. at 340-41, 798 P.2d at 1160; Petition at 17, 19. The Opinion, however, applies an objective standard. *See* Opinion, 59 Wash. App. at 340-41, 798 P.2d at 1160; *WSPIE & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 343 n.76, 858 P.2d 1054, 1078 n.76 (1993). Yet petitioners seemingly take issue and demand an objective standard. Petition at 22-25.

suggestion that they were singled out for "arbitrary action depending on the personal opinion of the judge" (Petition at 24) or that they received harsher treatment because of their status as a "minoritarian" religious group or cult is also unsupported by the record.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

BRUCE E. H. JOHNSON *
HOWARD STAMBOR
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Respondents

Dated: November 1, 1994

* Counsel of Record